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Sunday, October 01, 2006

Liberty and *habeas corpus* (I)

The writ of *habeas corpus* is an order from a national court to a local entity that has imprisoned a person to (1) produce that person at the national court, and (2) provide that court with a good reason for the imprisonment. *Habeas corpus* is is an extraordinary writ, and for that reason runs much farther than the normal jurisdiction of the national court. The local entity commanded by the writ can be *any* entity within the nation, or any within any territory of that nation (including military bases), or on any of the nation's ships at sea: any entity at all that claims the right to detain people. *Habeas corpus* is almost a millennium old, and in various forms it is probably much older. It has been and remains the main way by which legal rights against the arbitrary detention of a person by any kind of entity are enforced. *Habeas corpus* well deserves its other traditional name: the Great Writ.

Two cases help illustrate how crucial *habeas corpus* has been to the development of liberty. The core meaning of the word "liberty" itself is simply freedom from bodily constraint without due process of law. For many hundreds of years in legal systems derived from English law, *habeas corpus* has been the main, and often the only, mechanism by which this most essential of freedoms has been enforced.

Dr. Bonham's Case, in 1610, played a key role both in the history of American and Commonwealth constitutional law and in the ending of the power of the guilds. Guilds were somewhat like labor unions or business cartels, but often with an extra power -- the power to themselves convict and imprison those operating in the guild's business.

Besides guild courts, there were a large number and variety of other franchise courts in England: church courts, merchant's courts, manorial courts, mining courts, colonial courts, municipal courts, the courts of private counties, and so on. The king's courts generally had no jurisdiction to hear appeals from franchise or military courts except by extraordinary writ -- the most important of which was *habeas corpus.*

Dr. Bonham was imprisoned by the London physician's guild for practicing medicine in London without their license. *Habeas corpus* made it possible for Dr. Bonham to appeal his imprisonment. The Court freed Dr. Bonham, holding that his due process rights had been violated by the guild: the guild's conviction had not been obtained before a proper court.

Somerset's Case, in 1772, played a crucial role in the abolition of slavery. Somerset was a (former, it was argued) slave (formerly) owned by a merchant from the American colonies. When Somerset escaped from his master, he was recaptured and put on a boat for the British territory of Jamaica. An abolitionist petitioned on Somerset's behalf for *habeas corpus,* which Lord Mansfield granted. Still on the high seas, the writ of *habeas corpus* ordered the British captain to bring Somerset to London to be produced before the King's

About Me

Nick Szabo

"A premier thinker about history, law and economics, and the lessons they have for security." -- Adam Shostack, Emergent Chaos

"Szabo comes out with these essays that leave me in awe." -- Brian Dunbar

"Reading material that is eclectic, challenging and endlessly fascinating." -- Sean McGrath, Propylon

"Like most blogs worth my attention, this blog is updated only infrequently. That is because the authors of blogs worth my attention only post when they have something to say that is true, relevant and not already known by their audience. Most of the human race does not have the skill to know when an idea has these three properties. The skill is particularly rare in the fields of politics and economics, which is why this blog is such a rare and valuable thing." -- Richard Hollerith

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Bench. Slavery was no ordinary kind of property: it was also a deprivation of bodily liberty. As such, *habeas corpus* made it possible for the slave to challenge his status as bodily detained property. The high court's writ of *habeas corpus* reached far beyond Great Britain to the United Kingdom's colonies and its ships as sea. Once Parliament banned slavery across the British Empire, the Great Writ was crucial in implementing the ban to abolish slavery throughout that globe-spanning enterprise.

The Great Writ has been often been suspended in areas and periods of warfare, leading to great abuse but also to the ability to efficiently and ruthlessly fight the war without the legal overhead. The U.S. Constitution specifies that *habeas corpus* may be suspended only by Congress, and only with respect to invasion or rebellion (it may not be suspended domestically due to a foreign war or mere domestic crime), and even then only so long as public safety requires the suspension. Article I (listing the powers of Congress) states:

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it. Art. I, Â§9, cl. 2.

More about the *habeas corpus* , military detention, and the Military Commissions Act coming soon in a subsequent post.

UPDATE: Here are some subsequent posts on *habeas corpus* and the MCA:
The *Lex Gabina:* ancient Military Commissions Act?
Liberty and *habeas corpus* (II)

Posted by Nick Szabo at 2:09 PM

4 comments:

Abi said...

It's true that we don't know what we've got until it's gone, but it's also true that we don't know what we've been missing until it arrives.

Web Page Design for All

11:53 PM

Scot said...

I suppose that the powers that be could argue that the habeas corpus needs to be suspended now as the administration feels that its very principles and its perceived American way of life are under invasion. I don't think carte blanche was what was intended as an alternative by the framers of the Constitution. Carte blanche is what has been given our administration however and contrary to abi's comment, I don't think this is what we've been missing.

Safety Rule 4001

1:04 PM

Anonymous said...

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Yeah, it sucks. Tyranny is here. May I recommend Astroglide? Planning ahead is what it means to be an intelligent animal.

Sigh.

7:09 PM

Anonymous said...

Do you can write anything else about it? Great article!

10:55 AM

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